No. 90-5721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,

v.

TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE STATE ACKNOWLEDGES THAT THE CAPITAL SENTENCING DECISION MAY NOT BE BASED UPON A WEIGHING OF THE WORTH OF THE VICTIM'S LIFE AGAINST THAT OF THE DEFENDANT'S. YET, THE INEVITABLE RESULT OF OVERRULING *BOOTH* AND *GATHERS* WILL BE TO REQUIRE THE SENTENCER TO ENGAGE IN PRECISELY SUCH WEIGHING. THIS, IN TURN, MEANS THAT SOME LIVES WILL BE CONSIDERED WORTH MORE THAN OTHERS.

The inevitable result of permitting a capital sentencing decision to be based upon the worth of the victim is that some lives will be considered worth more than others.[1] This is proven by the following syllogism:

1. The jury may consider the worth of the victim in deciding whether to impose the death penalty;
2. The greater the victim's worth, the more justified society is in executing the offender;
3. Therefore, the lives of some victims are worth more than others.

The State candidly acknowledges that a defendant's execution should not depend upon his victim's worth. The State thus writes: "The Court [in *Booth*] was understandably concerned that juries not make a decision as to whether to impose life or death based upon a weigh-

[1] We are aware that legislatures, in classifying offenders for death eligibility, often enhance punishment on the basis of the victim's status. These statutes do not, however, represent a legislative proclamation that some lives are worth more than others. They instead signify a legitimate governmental interest that is served by extending additional protection to the defined class of victims. *See* Part III, *infra*.

ing of the relative worth of the victim's life against that of the defendant's. *The respondent agrees that such a result should be avoided*" (Brief of Respondent at 36) (emphasis added). Later, the State says:

> Aside from these characteristics which have inherent constitutional limitations [race, sex and religious preference], other character evidence may be presented without violating the Constitution *so long as it is presented in a manner that does not tend to shift the focus of the jury to weighing the relative worth of the defendant's life against that of the victim* (emphasis added).

Id. at 38.

In this case, the jury's focus was indeed shifted to a comparison of the defendant's life and the victims' worth:

> [Petitioner's counsel] [2] says but [sic] Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. But they are not here with us any more. You have to weigh what has happened.

The State's insistence that this argument "did not bring about the shift in focus which the Constitution would prohibit" (Brief of Respondent at 38) amazingly ignores what the prosecutor was plainly asking the jury to do. Having previously conceded the unconstitutionality of the very weighing process in which Payne's jury was asked to engage, the State understandably would like to place a different gloss on the prosecution's argument. The proof, however, is in the pudding.

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[2] Payne was not represented by the undersigned at trial or on his appeal to the Tennessee Supreme Court.

II. THE STATE AND SOLICITOR GENERAL MISUNDERSTAND THE "FORESEEABILITY" CONCEPT. THE EIGHTH AMENDMENT DOES NOT PROHIBIT A PROSECUTOR FROM ASKING THE JURY TO ASSESS THE CRIME AND THOSE CONSEQUENCES THAT WERE FORESEEABLE TO THE DEFENDANT AT THE TIME HE COMMITTED THE CRIME.

In our first brief, we explained that the jury's focus must be on the consequences foreseeable to the offender at the time he committed the crime (Brief of Petitioner at 12-13). *See Booth v. Maryland*, 482 U.S. 496, 505 (1987). To the extent permitted by the record, the prosecution may ask the jury to step into the defendant's shoes at the time he committed the offense and consider the consequences that the offender should have then appreciated. *See, e.g., United States v. Murphy*, 30 M.J. 1040 (ACMR 1990).[3] Such an argument properly focuses on the offender's state of mind and, hence, his moral culpability.

An offender's moral culpabiilty is, however, not revealed by events that actually occur subsequent to the commission of the crime. This is so even if those events happen to fall within the range of consequences foreseeable at the time he committed the offense. By the same token, though, since the law's concern is properly with the offender's state of mind at the time he committed the crime, the mere fact that the foreseeable consequences

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[3] *Murphy*, cited by the Solicitor General (*amicus* Brief of United States at 3 n.2), illustrates a constitutionally permissible use of victim impact information. The defendant in that case murdered his ex-wife, her child and his own child by his ex-wife. Evidence of the ex-wife's character was properly admitted at the sentencing hearing to rebut the defendant's claim that he was afraid she would not take proper care of his son and to show that the defendant was aware of the value of the life he was extinguishing. *Id.* at 1062. The Court correctly held that *Booth* permitted the sentencer to assess the crime and its consequences "through the eyes of the murderer." *Id.*

did not in fact subsequently occur does not render those foreseeable consequences irrelevant.

An understanding that the jury's focus must be on the consequences foreseeable to the offender when he committed the crime will better enable us to analyze the evidence and arguments used by the prosecution in this case. More specifically, it will help us distinguish those references to the crimes' consequences that were proper from those that were improper.

In its rebuttal argument at the sentencing trial, the prosecution referred to the fact that Lacie Jo would never be able to go to a high school prom (J.A. 14). This, of course, is a constitutionally permissible argument. The perpetrator of these crimes knew that he was killing a little girl who would forever miss the opportunity to grow up, to go through the trials and tribulations of adolescence, and to participate in such events as high school proms.[4] Furthermore, as we pointed out in our first brief,[5] the Eighth Amendment would not have prohibited the prosecution from arguing that the perpetrator knew that, if a child by chance survived the attack, as Nicholas did, that child would miss his mother and his sister.

There is, however, a marked distinction between making these arguments and proving the events that actually occurred subsequent to Charisse's and Lacie Jo's deaths. The former properly invited the jury to assess the offense and its foreseeable consequences through the defendant's

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[4] Similarly, in a case involving the knowing murder of a minister, the prosecution would not be forbidden by the Eighth Amendment from arguing that the defendant knew that he was killing someone who ministered to those in spiritual need. The prosecution would, however, be prohibited from calling a witness who, unbeknownst to the defendant, had been helped by the minister through a particular crisis and would have consulted with the minister in the future if he had remained alive.

[5] Brief of Petitioner at 12-13.

eyes. *See United States v. Murphy*, 30 M.J. at 1062. The latter, however, asked the jury to step forward in time to see what had actually occurred following the commission of the offenses. When this was done, the jury was no longer being asked to assess the crimes and their foreseeable consequences from the defendant's vantage point, but was instead being asked to weigh the defendant's life against the harm that occurred subsequent to the crimes. The focus was no longer on whether the defendant's conduct and character warranted the imposition of the death penalty, but on whether the magnitude of the survivors' grief merited the defendant's execution.

What makes Mrs. Zvolanek's testimony (J.A. 3) irrelevant is the purpose for which it was offered. After-the-fact occurrences are not evidence of those consequences that were appreciable to the offender at the time of the crime. As the State recognizes, Mrs. Zvolanek's testimony was instead offered to show the harm that actually occurred following the commission of these crimes (Brief of Respondent at 23).[6] In the State's view, the testimony was relevant because, "[t]he greater the harm, the more worthy the individual is of blame and the greater the penalty society may demand." *Id.*

That the State's position is indefensible is revealed by posing the converse of the above-quoted statement. We doubt that the State really believes that, when the harm occurring subsequent to the crime is not as substantial as might otherwise have been expected, the offender is somehow less worthy of blame and that society is less entitled to a severe punishment. If, for example, Nicholas had been better able to adjust to the tragic loss of his mother and sister than one could reasonably have anticipated, would these crimes have been less heinous? Surely not. Nor, in such event, would the prosecution

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[6] We must not overlook the fact that Mrs. Zvolanek's testimony not only depicted the crimes' subsequent effect on Nicholas, but also revealed her own grief as well. In its arguments, the prosecution referred to the grandparents' grief (J.A. 12, 15).

have been precluded from arguing that the perpetrator knew, when he killed Charisse and Lacie Jo, that the little boy was likely to experience severe emotional problems. The purely fortuitous event that the little boy had not experienced such problems would in no way have diminished the offender's culpability.

In addition to incorrectly arguing that the after-the-fact events demonstrated the defendant's moral blameworthiness, the State further contends that Mrs. Zvolanek's testimony was relevant to rebut mitigating testimony by Payne's girlfriend that Payne loved, and was himself loved and missed by, her children (Brief of Respondent at 26). In the State's view, Mrs. Zvolanek's testimony "directly paralleled" that of Payne's girlfriend. *Id.*

The State thus, once again, advocates weighing an offender's life against the after-the-fact harm occasioned by the victim's loss. It is ironic that the State takes this position in view of the fact that, as we just observed in Part I, the State candidly acknowledges the constitutional impropriety of weighing the victim's worth against the defendant's life. *Id.* at 36, 38. As Justice Scalia has pointed out, it is difficult to divorce a victim's admirable personal characteristics from the particular injury caused to the victim's family and fellow citizens. *South Carolina v. Gathers*, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting). It is, therefore, illogical for the State to correctly acknowledge the unconstitutionality of weighing an offender's life against the victim's worth while simultaneously advocating weighing his life against the after-the-fact impact of the crime.

The degree to which a prosecutor will be able to refer to the foreseeable consequences of the crime, as well as to the victim's characteristics, will, of course, depend on the extent to which the record in any given case permits it. We conclude this discussion by offering a jury instruction that would, in our view, satisfy the Eighth Amendment:

Members of the jury, you have heard testimony about the victim's characteristics. You have also heard arguments about the consequences that the defendant may have been in a position to foresee at the time he committed the offense. In considering this testimony and these arguments, you are not to weigh the defendant's life against the worth of the victim's life or against the actual impact of the crime. You are instead to consider the victim's characteristics and the consequences of the crime solely through the eyes of the defendant at the time he committed the crime. You may consider those matters within your common experience that would have been foreseen by the defendant as possible consequences of his crime. You must then decide the extent to which, if at all, the defendant's personal guilt for these crimes is shown by his knowledge of the victim's characteristics and his awareness of the crime's possible consequences.

III. A LEGISLATURE, WHEN ACTING IN FURTHERANCE OF A LEGITIMATE GOVERNMENTAL INTEREST, MAY DEFINE A CLASS OF PERSONS THAT IS ENTITLED TO INCREASED PROTECTION OR A CATEGORY OF HARM THAT JUSTIFIES MORE SEVERE PUNISHMENT. IN THE CAPITAL SENTENCING CONTEXT, A LEGISLATURE MAY CLASSIFY AS DEATH ELIGIBLE THOSE OFFENDERS WHO MURDER A MEMBER OF THE PROTECTED CLASS OF PERSONS OR WHO CAUSE THE CATEGORY OF HARM DESIGNATED FOR SPECIAL CONDEMNATION. NEITHER A LEGISLATURE AT THE "NARROWING"[7] STAGE, NOR A JURY AT THE SENTENCING STAGE, MAY, HOWEVER, ENHANCE CAPITAL PUNISHMENT ON THE BASIS OF NON-SPECIFIC VICTIM CHARACTERISTICS OR IMPACTS.

Legislatures often enhance punishment on the basis of the victim's status or the degree of harm caused by the proscribed conduct. It does not follow from this, however,

[7] *See Zant v. Stephens*, 462 U.S. 862, 870-73 (1983).

that a capital sentencing jury may permissibly enhance punishment on the basis of non-specific victim characteristics or impacts. We demonstrate this in two steps. In Section A, we discuss the circumstances under which legislatures, when classifying offenders for death eligibility, may constitutionally enhance punishment on the basis of the victim's status or the degree of harm caused by the proscribed conduct. We further explain in Section A that a legislature could not, even if it desired to do so, enact a statute making death eligibility dependent upon non-specific victim characteristics or impacts. In Section B, we show that a sentencing jury, like a legislature, is also constitutionally prohibited from imposing death on the basis of such factors.

A. Legislatures may enhance punishment on the basis of the victim's status or the degree of harm caused by the proscribed conduct whenever the legislation furthers a legitimate governmental interest and avoids arbitrariness by specifically defining the class of persons to be protected or the category of harm to be condemned. Legislation that attempted to enhance punishment on the basis of non-specific victim characteristics or impacts would, however, be impermissibly arbitrary.

The Eighth Amendment does not prohibit a state legislature or Congress from making death eligibility dependent upon the status of the victim, provided that there is a legitimate governmental interest in imposing a more substantial punishment for the murder of such victims than for the murder of others. *Zant v. Stephens*, 462 U.S. at 877. *Booth* and *Gathers* certainly do not say or indicate otherwise. Similarly, *Booth* and *Gathers* do not prohibit a state legislature or Congress from making death eligibility dependent upon the degree of harm caused by the proscribed conduct, provided, again, that there is a legitimate governmental interest in punishing those responsible for that harm more severely than those who are responsible for other types of harm.[8] *Id.*

Punishment enhancement must serve a legitimate governmental interest and avoid arbitrariness. Two examples illustrate the manner in which a legislature may further a legitimate governmental interest in a non-arbitrary fashion.

A society, acting through its elected representatives, may punish the murderer of a peace officer even if the offender is unaware of his victim's employment status at the time of the crime. *See Roberts v. Louisiana*, 431 U.S. 633, 636 (1977). Society's interests in deterrence and retribution justify the enhanced punishment of such offenders. Deterrence is served, because a potential offender will realize that the consequences are more serious when the victim he kills happens to be a peace officer. Retribution is satisfied by the legislative finding that peace officers serve a special societal need and that murdering them constitutes an especially grievous affront to society. Arbitrariness is avoided, because the legislature has defined with particularity the class of persons receiving the additional protection.

Similarly, Congress may designate for death eligibility a participant in an air highjacking that results in death, even though the offender did not himself directly cause or intend the death. 49 U.S.C. app. § 1472(i). Again, the law enforcement objectives of deterrence and retribution are served. Congress may rationally decide that the increased penalty will deter dangerous conduct, and, additionally, it is justified in finding that society regards

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[8] In trials involving such statutes, *Booth* and *Gathers* simply mandate that the sentencing jury, after first determining that the defendant fits into the death eligible category, be precluded from deciding the defendant's fate by weighing his life against either the worth of his victim or the actual impact of the offense. The mere fact that the jury may be required to consider the victim's status or the crime's consequences in order first to find the existence of the requisite aggravating factor creates no Eighth Amendment problems.

deaths resulting from highjacking as an especially egregious affront. Arbitrariness is avoided because Congress has specifically identified the particular category of harm that is to receive special condemnation.

Penalty enhancement based upon a specifically defined class of victims or category of harm is hardly unique to capital punishment determinations. For example, all states, as far as we know, allow a more severe punishment to be imposed upon the driver who runs a stop sign and kills another person than upon the driver who runs the same stop sign but, fortuitously, injures no one.

This punishment enhancement, like those for the murderer of a peace officer and the participant in a highjacking that results in death, promotes deterrence and retribution and avoids arbitrariness. Deterrence is promoted, because drivers will be more careful if they are aware of the severe punishment that can result if, by chance, they kill someone when they run a stop sign. Retribution is demonstrated by society's belief that a traffic violation resulting in death is a more serious affront than such a violation without injury. Arbitrariness is avoided, because the state has specifically defined the category of harm (death resulting from running a stop sign) designated for heightened condemnation.

The Solicitor General's suggestion that a legislature may enhance the punishment of those who murder the parents of minor children (*amicus* Brief of United States at 16) further illustrates our point. The Solicitor General may well be correct. The Constitution permits legislatures very wide leeway to make death eligible those who kill a member of a specifically defined class of victims or participate in specifically defined types of activity that result in death. As long as there is a rational basis for the legislative finding of governmental interest and as long as the designated class of victims or category of harm is specifically defined, there is no constitutional violation. While reasonable people can debate the merits of

particular classifications and can disagree over whether such classifications really promote deterrence or retribution, such debates must, with very rare exceptions, be resolved by the citizens' democratically elected representatives.[9] *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976); *California v. Ramos*, 463 U.S. 992, 1000 (1983).

The problem in this case is that Payne's punishment was enhanced on the basis of victim characteristics and impacts that have not been legislatively defined and that, indeed, are incapable of precise legislative definition. A reference to the peace officer, highjacking and traffic violation examples just discussed will demonstrate that no legislature could enact a statute that enhances punishment on the basis of the factors that the jury considered in imposing Payne's death sentence.

In none of these three examples has the legislature enhanced punishment on the basis of non-specific victim characteristics or impacts. The Louisiana legislature, for example, did not make a punishment distinction between the murder of a peace officer who had led an "exemplary life" and one who had not, or between the murder of a peace officer who left "especially aggrieved survivors" and the murder of one who left either no, or less aggrieved, survivors. *See Roberts v. Louisiana*, 431 U.S. at 636. Nor did Congress and the state legislature, respectively, make similar differences among victim characteristics or impacts the basis for punishment distinctions between different death eligible highjackers or between different death-causing traffic violators.

That these legislative bodies are constitutionally prohibited from making such punishment distinctions is obvious. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Making

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[9] Indeed, if this nation's citizens better appreciated just how much discretion their elected representatives have in making decisions of this type, they might compel their representatives to make these hard choices and to cease "handing off" this obligation to the courts and administrative agencies.

the severity of the penalty dependent upon whether the victim led an "exemplary life," for example, or upon whether the crime caused "profound grief," would create such arbitrary results that neither deterrence nor retribution would be served. Potential offenders would have no basis for knowing when their conduct would be treated more severely. Nor could society derive any retributive satisfaction since the affronts designated for more severe punishment would be too vaguely defined to inform society of those particular affronts that would receive the increased penalty.

Notwithstanding the arbitrariness attendant to any legislative attempt to enhance punishment on the basis of such non-specific factors, both the State and Solicitor General contend that a jury, at the sentencing stage, may impose death because the victim led an exemplary life or because his survivors experienced profound grief (Brief of Respondent at 21-22; *amicus* Brief of United States at 16-17). As we shall now explain, they are wrong.

B. Inconsistency is inevitable in capital sentencing hearings. Such inconsistency is produced by variables (for example, differences in juror perspectives, variations in the relevant evidence, and the differing abilities of counsel) that are inherent in, and necessary to the operation of, individualized sentencing hearings. This does not mean, however, that the Eighth Amendment tolerates the introduction of other variables that are not necessary to the operation of such hearings. Non-specific victim characteristics and impacts are variables that cannot be constitutionally tolerated.

Uniformity among the sentences of death eligible offenders is impossible to achieve. Such uniformity can never occur as long as juries are given the substantial discretion that the Eighth Amendment requires. *Cf. Gregg v. Georgia*, 428 U.S. at 220-26 (White, J., concurring). Two different juries might view the same evidence and reach opposite conclusions. Moreover, variations in the proof, as well as the differing abilities of the lawyers, make it difficult to distinguish in any meaningful fashion those cases in which death is imposed from those in which it is not. *See Booth v. Maryland*, 482 U.S. at 517-18 (White, J., dissenting). Inconsistency among the sentences of death eligible offenders is, therefore, an inevitable by-product of a system that affords substantial discretion to juries. This inevitable inconsistency is not unconstitutional, since the variables creating it must necessarily be present if juries are to be given the discretion required by the Eighth Amendment.

This does not mean, however, that the Constitution tolerates the introduction of *any* arbitrary factor at the selection stage. Sentencing decisions could not stand if, for example, they were based on considerations of such impermissible factors as race, religion, or political affiliation. *Zant v. Stephens*, 462 U.S. at 885. Similarly, the Constitution also prohibits sentencing juries from considering other factors that unnecessarily produce arbitrary and capricious sentencing patterns. *See California v. Ramos*, 463 U.S. at 999-1000 (pointing out that, though the Court must generally defer to the states on the substantive factors that may be laid before the jury, "[i]t would be erroneous to suggest, however, that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate").

The mere fact, therefore, that some inconsistency is inevitable in capital sentencing hearings does not permit the introduction of any and all arbitrary variables in such hearings. When a factor producing inconsistent results is a necessary part of the sentencing determination, its use is constitutionally permissible. When, however, the factor producing an inconsistency is not necessary to the operation of capital sentencing hearings, it cannot be tolerated.

The issue that must be decided here, therefore, is whether non-specific victim characteristics or impacts con-

stitute variables that are necessary to the operation of capital sentencing hearings. If so, their introduction into the sentencing process is constitutionally permissible, just as is the introduction of such other variables as differing juror perspectives and differences among lawyers.

One possible basis for allowing the use of these variables that may be eliminated out of hand is their relevance to prove an offender's state of mind, character, or propensity for future dangerousness. Differences in the backgrounds, records, mental health, and personality traits of death eligible offenders guarantee that the offenders will be treated differently. The same is, of course, true for variations in their mental states and *modus operandi* at the time they committed their crimes. This possible basis for allowing the use of these variables must be eliminated, however, because victim characteristics not known to the defendant and after-the-fact consequences are indisputably irrelevant to prove an offender's state of mind, character, or propensity for future dangerousness. We do not understand the State or Solicitor General to contend otherwise.

A second possible basis for allowing juries to base their decisions on non-specific victim characteristics and impacts that can also be quickly eliminated is the claimed relevance of these variables to rebut the offender's mitigating evidence. The use of these variables in this fashion requires the jury to weigh the defendant's life against the victim's worth [10] and against the impact of the crime.[11] As the State has candidly acknowledged, at least in the case of victim worth (Brief of Respondent at 36, 38),[12] such weighing impermissibly shifts the jury's focus from a decision on whether the defendant should live or die to

[10] *See supra*, Part I.

[11] *See supra*, Part II.

[12] *See supra*, Part I.

a comparison of the respective lives of the defendant and the victim.[13]

The third and final possible basis for introducing non-specific victim characteristics and impacts into the capital sentencing determination is the claimed relevance of these variables to retribution. This basis must, however, also be rejected, because allowing sentencing juries to impose death on the basis of non-specific victim characteristics and impacts will not serve society's interest in retribution.

Retribution signifies society's desire that certain affronts be designated for punishment. It is axiomatic that, before society can express its desire that certain affronts be punished, it must first define those affronts. A punishment, in order to be a valid exercise of retribution, must follow the command that authorized retribution in the first instance. In the absence of a meaningfully defined affront, there is no way to determine if a particular offender's punishment is in accord with society's desire for retribution.

Punishment enhancements based on victim worth or impact would, in the absence of definable classes of protected persons or definable categories of condemned harm, inevitably be beset with uncertainty about whether the enhanced punishment was being correctly meted out in response to the interests society sought to protect. Unanswerable questions would be raised: Are the desired groups of people being protected? Are the harms that society wishes to condemn the ones that are, in fact, being most severely punished?

Retribution, therefore, must be invoked in the first instance at the narrowing stage, when the legislature defines the classes of victims it wishes to protect or the categories of harm it desires to condemn. The role of the

[13] In *Woodson*, *Lockett*, *Eddings*, and subsequent cases, there was no indication that a death eligible offender, having offered mitigating evidence bearing on his uniqueness as an individual in an effort to avoid execution, would enjoy a better chance if his victim happened, by chance, to have led a less than exemplary life or to have been someone who left behind no grief-stricken survivors.

sentencing jury must be limited to implementing retribution by deciding whether a particular death eligible offender should be executed.

Here, as we just explained in Section A, the legislature could not define the affronts (i.e., the murder of persons who led "exemplary lives" and murder causing "profound grief") that the jury considered in imposing Payne's death sentence. Because the variables on which Payne's sentence was based are too vague to support a legislative classification of death eligibility and because those variables are not necessary to the operation of capital sentencing hearings, Payne's sentence was necessarily the result of the kind of "excessively vague sentencing standards . . . condemned in Furman." *See California v. Ramos*, 463 U.S. at 1000 (citing *Gregg v. Georgia*, 428 U.S. at 195 n.46).

Because non-specific victim characteristics and impacts are variables that are not necessary to the operation of a capital sentencing hearing, their introduction produces arbitrary punishment distinctions that cannot be constitutionally tolerated.

IV. THE PROSECUTION'S APPEAL TO THE JURY TO IMPOSE DEATH IN ORDER TO SATISFY AN ANTICIPATED DESIRE BY NICHOLAS CHRISTOPHER FOR PAYNE'S EXECUTION VIOLATED THE EIGHTH AMENDMENT. THIS REQUIRES SETTING ASIDE PAYNE'S DEATH SENTENCE, EVEN IF THE COURT DECIDES TO OVERRULE *GATHERS* AND THAT PART OF *BOOTH* WHICH DOES NOT DEAL WITH SURVIVORS' OPINIONS. FURTHERMORE, THOUGH IT IS NOT NECESSARY FOR THE COURT TO REACH THE ISSUE, THE PROSECUTION'S ARGUMENT WAS ALSO FUNDAMENTALLY UNFAIR AND THUS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The State, in responding to this particular point, omitted the first and most important sentence in the concluding remarks of the prosecution's initial closing argument (Brief of Respondent at 40-41). The omitted remark reads: "But there is something you can do for Nicholas" (J.A. 12). By omitting this key statement, the State was able to avoid portraying the prosecution's argument for what it really was: An emotional plea to sentence Payne to death to avoid letting Nicholas down.

The government's insistence that the prosecution's argument is not governed by *Booth* (*amicus* Brief of United States at 26 n.15) completely ignores the fact that the prosecution, acting as Nicholas' surrogate, eloquently expressed the anticipated desire of Nicholas for Payne's execution. It also ignores the fact that the prosecution told the jury that this would be a compelling reason for imposing the death penalty. *Booth* surely condemns such an argument every bit as much as it condemns survivors' opinion testimony.

The prosecution's emotional appeal was, in actuality, more prejudicial in its effect than similar opinion testimony by Mrs. Zvolanek would have been. Such testimony, while it would have been highly prejudicial and violative of the Eighth Amendment, *Booth*, 482 U.S. at 508-09, would not , in all likelihood, have differed from the jurors' expectations concerning Mrs. Zvolanek's feelings. Here, however, the jurors were expressly told by the State's representative that satisfaction of a victim was a permissible reason to impose death—satisfaction of a victim, it is important to note, for whom the jury understandably already felt great sympathy. Not only did the prosecution tell the jury it could sentence Payne to death "for Nicholas' sake," it also made the jurors feel that they would be letting Nicholas down if they returned a different verdict.

We know of no opinion in which this Court has even intimated, much less held, that satisfaction of a victim's survivor is a permissible reason for imposing the death penalty. Indeed, the Court has gone to great lengths to eliminate, to the extent humanly possible, any risk that

the sentencing jury will decide a defendant's fate on the basis of reasons not properly bearing on whether he should live or die. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); *California v. Ramos*, 463 U.S. at 998-99 (pointing out that the procedure in capital sentencing trials must be scrutinized to ensure that the death penalty is not meted out in an arbitrary and capricious manner). Because of the risk that Payne's sentence was based on a constitutionally invalid reason for imposing the death penalty, his death sentence must be set aside.

Though it is not necessary that the Court reach the issue, the prosecution's argument also violated the "fundamental fairness" test set forth in *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Donnelly v. De Christoforo*, 416 U.S. 637 (1974). The argument in this case was not simply an expression of prosecutorial zeal made during the "heat of battle." It was instead a calculated attempt to obtain from the jury an emotional decision grounded on a reason that cannot properly be the basis of a death sentence. It was hardly a coincidence that the prosecution chose to conclude both its initial closing argument (J.A. 12) and its rebuttal (J.A. 17) with improper appeals to the jury's emotion. (At the conclusion of its rebuttal argument, the prosecutor picked up the murder weapon and stabbed a diagram of Nicholas that had been marked as a trial exhibit, *Tennessee v. Payne*, 791 S.W.2d at 20) (J.A. 45).) Because of the prosecution's deliberate efforts to overcome reason with emotion, as well as the prejudicial effect of the prosecution's argument, that argument must be considered fundamentally unfair.

V. THE FACT THAT THE PROSECUTION CALLED MRS. ZVOLANEK TO TESTIFY, EMPHASIZED THE CRIMES' EFFECTS ON NICHOLAS AND THE GRANDPARENTS, DRAMATICALLY PLEADED WITH THE JURY TO IMPOSE DEATH TO AVOID LETTING NICHOLAS DOWN, INVITED THE JURY TO WEIGH THE DEFENDANT'S LIFE AGAINST THAT OF THE VICTIMS, AND RESORTED TO UNETHICAL THEATRICS SHOWS THAT THE PROSECUTION BELIEVED THAT IT COULD NOT OBTAIN A DEATH VERDICT SOLELY ON THE EVIDENCE OF THE CRIMES AND THUS GRAPHICALLY DEMONSTRATES THAT THE USE OF *BOOTH*-CONDEMNED INFORMATION IN THIS CASE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The State must not be permitted to go to great lengths to inject prejudice into the trial and subsequently, on appeal, disclaim its efforts by proclaiming that its unconstitutional conduct was, in hindsight, ineffective.

Except for the custodian of the video tape, Mrs. Zvolanek was the prosecution's only witness during the sentencing trial. If her testimony was really harmless beyond a reasonable doubt, why did the prosecution call her to testify (J.A. 2-3)? Why did the prosecution tell the jury in its opening statement during the sentencing phase that she would be called to describe the crimes' effects on Nicholas (J.A. 5)? Why did the prosecution solicit the jury to weigh Payne's life against the after-the-fact consequences that befell Nicholas and the grandparents (J.A. 15-16)? Why did the prosecution also ask the jury to weigh Payne's life against the character of the victims (J.A. 17)?

If the prosecution's appeal to the jury to impose death in satisfaction of an anticipated desire by Nicholas for Payne's execution was harmless beyond a reasonable doubt, why did the prosecution choose to make this dramatic appeal at the conclusion of its initial closing argu-

ment (J.A. 12)? Why, in its very last remarks to the jury, did the prosecution resort to grossly unethical behavior (J.A. 17) (*State v. Payne*, 791 S.W.2d 10, 20) (J.A. 45)?

The answers to these questions are simple. The prosecution knew that, though these crimes were brutal and shocking, all of the other evidence in the case mitigated in favor of sparing Payne's life. Fearing that the jury might temper with mercy its outrage at the horrible results of five uncharacteristic minutes in Payne's life, the prosecution used *Booth*-condemned evidence and arguments to ensure that Payne would not carry his burden of proving that the mitigating evidence outweighed the aggravating factors.

CONCLUSION

For the reasons stated herein and in our first brief, Petitioner respectfully submits that the Court's decisions in *Booth* and *Gathers* should not be overruled; that the Court should determine that the State's reliance upon *Booth*-condemned evidence and arguments violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution; that Petitioner's death sentence should be set aside; and that this case should be remanded for proceedings not inconsistent with the Court's judgment.

Respectfully submitted,

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